

CORPORATIONS AND SECURITIES PANEL

ANNUAL REPORT 1993 – 94

**CORPORATIONS  
AND  
SECURITIES PANEL**

20/10/94

The Honourable M Lavarch  
Attorney General  
Parliament House  
Canberra ACT 2600

Dear Minister,

I have the honour to submit to you, in accordance with section 183 of the Australian Securities Commission Act 1989, this report on the operations of the Corporations and Securities Panel for the period 1 July 1993 to 30 June 1994.

This report is the third report on the operations of the Panel, the Panel having been established on 1 January 1991 did not come into being until 3 July 1991 with the appointment of its first members

Yours sincerely

Ron Evans  
President  
Corporations and Securities Panel

President: Ron Evans Members: Ross Adler, Elizabeth h Alexander, The Hon. Jerrold Cripps QC, David Elsum :W. Warwick Higgs  
Stuart Horney AO Peter Jooste, Russell Miller, The Hon Justice Trevor Morling Peter O'Donohur Graham Stanford, Geoff Torney.  
See: Nigel Morris

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## Contents

	Page No
1. The Role of the Panel.....	1
2. The Structure of the Panel.....	2
Establishment and Commencement of the Panel.....	2
Members.....	2
President.....	2
New Members.....	2
Reporting.....	2
Staff .....	2
3. The Work of the Panel in 1993-94.....	3
Panel Procedures .....	3
4. Legislation.....	3
Interim Order Changes .....	3
Corporations Legislation Amendment Act 1994 - Changes .....	3
5. Future Directions.....	4
6. Panel Expenditure.....	5
Remuneration.....	5
Audit.....	5
7. Appendix A - Panel Members.....	6
8. Appendix B - Panel Financial Statement 1993-94.....	7

## **1. The Role of the Panel**

The Panel was brought into law with the introduction of the Corporations Law on 1 January 1991. It is partly a response to concerns of the legislature and the business community that the previous regulator of the market for control of Australian companies, the National Companies and Securities Commission (NCSC) ran the risk of being perceived as prosecutor, judge, jury and executioner. The Panel is also partly a move to bring the concept of peer review to the difficult concept of acceptable behaviour and market integrity.

Panel members are selected for their knowledge of, or experience in, business, the administration of companies, the financial markets, law, economics and accounting. They are persons who have practical experience in the operation of business and who will bring to the Panel's deliberations on unacceptable circumstances their experience and expertise and also, importantly, knowledge of the standard of behaviour which the market expects of its participants.

The Panel's role is to consider applications from the Australian Securities Commission (ASC) for a declaration that an acquisition or acquisitions of shares in a company or conduct engaged in by a person in relation to shares in, or the affairs of, a company is or are unacceptable. Unacceptable conduct and unacceptable acquisition are defined in s732 of the Corporations Law (Law) and are based on the "Eggleston Principles" which were set out in the Company Law Advisory Committee's Second Interim Report to the Standing Committee of Attorneys-General of February 1969 and chaired by R M Eggleston. In determining whether an acquisition or conduct is unacceptable the Panel must consider whether the Eggleston principles have been breached, any other matters which the Panel considers relevant and whether it is in the public interest to declare the acquisition or conduct to be unacceptable.

In performing its role the Panel may hold inquiries, take submissions, hear evidence, require persons to appear or to produce documents, make declarations of unacceptability, and make legally binding orders. The orders are those it considers necessary or desirable to protect the rights or interests of persons in a takeover or to negate the effects of unacceptable conduct or acquisitions referred to the Panel.

## **2. The Structure of the Panel**

### Establishment and Commencement of the Panel

The Panel was established with the proclamation of the Law and the Australian Securities Commission Law (ASC Law) on 1 January 1991, its first members were appointed on 3 July 1991.

### Members

The Panel has at least five members who may be full or part time members. The legislature considered that part time membership would allow active members of the business community to participate on the Panel. This would widen the range of potential members and ensure that the Panel reflects current standards of the securities market.

The Governor General appoints members on the nomination of the Minister. They are appointed for a period of no more than five years. The relevant Ministers from the States and Territories may give the names of suitable nominees to the Minister for consideration. The Panel had sixteen part time members at 30 June 1994.

President One member of the Panel is appointed by the Governor General to be the President of the Panel (President). Mr David Hoare was appointed as the first President of the Panel. He has been appointed to be the Chairman of the companies and Securities Advisory Committee and will retire as president of the Panel on 30 September 1994. The Panel wishes to express its sincere gratitude to Mr Hoare for his significant contributions to the development of the Panel and his strong leadership.

### New Members

Two new members were appointed during 1993-94. The Hon. Mr Jerrold Cripps QC. and The Hon Mr Justice Trevor Morling were appointed on 4 March 1994. The Hon Mr Justice Morling is presently a Judge of the Supreme Court of the Northern Territory. His experience includes Deputy President of the Administrative Appeals Tribunal, Judge of the Federal Court of Australia and Chairman of the Australian Electoral Commission. The Hon. Mr Jerrold Cripps QC. has similarly had extensive experience in conducting inquiries. His experience includes Chairman of the NSW Legal Commission, President of the NSW Anti-Discrimination Board and Chief Judge of the Land and Environment Court.

### Reporting

The Panel is required under s 183 of the ASC Law to prepare a report as soon as practicable after 30 June and in any case before 31 October each year and give a copy the Minister.

### Staff

The ASC provides the staff and support facilities to the Panel for the performance by the Panel of its functions and powers. The ASC provides the Panel with a senior officer to act as secretary to the Panel and other facilities for the holding of hearings.

### **3. The Work of the Panel in 1993-94**

The Panel received no applications from the ASC in 1993-94.

#### **Panel Procedures**

In its first determination of an application the Panel found many complicating factors in its path to a conclusion. The process through which the Panel attempted to reach its determination has been criticised by some as being too cumbersome and legalistic. The Panel had to consider issues of conflict of interest and interpretation of the legislation and encountered many delaying factors. Such problems were to be expected in the first matter.

The Panel was, however, concerned that what should be, and is directed in the legislation to be, as informal and expeditious a process as possible, could become unnecessarily protracted and ponderous. To this end the President of the Panel had discussions with the Attorney General, his Department and the ASC on the procedures of the Panel. The discussions resulted in the publication for comment of the first exposure draft of the Corporations Legislation Amendment Bill 1993. The Bill was published in late 1993 with closing date for initial comments in February 1994. It was assented to as the Corporations Legislation Amendment Act No 10-1 of 1994 on 5 July 1994. The provisions relating to the Panel will not commence until the supporting Regulations have been prepared and commence.

The object of the provisions of the Corporations Legislation Amendment Bill 1993 which dealt with the Panel was to introduce changes to improve the Panel's procedures to ensure that they do meet the legislative criteria of informality, expedition and minimal technicality.

During 1993-94 Panel members, especially the President Mr Hoare, and Panel staff were involved in discussions on the development of the legislative changes in the Corporations Legislation Amendment Bill 1993.

### **4. Legislation**

The legislation under which the Panel operates is in Part 6.9 of the Law and Part 10 of the ASC Law. Part 6.9 sets out the definition of unacceptable circumstances, and the provisions relating to the making of declarations and orders by the Panel. Part 10 of the ASC Law sets out the procedures of the Panel in its operations and inquiries.

#### **Interim Order Changes**

Following the decision of the full bench of the Federal Court that the Panel could not make interim orders prior to having made a declaration of unacceptability, the Corporations (Unlisted Property Dusts) Amendment Bill 1991 amended the interim order provisions of the Law to ensure that the Panel has power to make interim orders prior to the making of a declaration of unacceptability. (sections 733A, 733B, 735(2), 735(2A) and 735(3))

#### **Corporations Legislation Amendment Act 1994 – Changes**

The changes introduced by the Corporations Legislation Amendment Act 1994 were intended to increase the certainty of the procedures for the Panel's business by setting them out in a more detailed manner and thereby reducing the possibility of the Panel being excessively delayed or thwarted by uncertainty in the content of natural justice it was required to give in the statutorily narrow time frame given to it by the legislature. The draft

legislation would have removed the explicit requirement to afford natural justice in an inquiry and replaced it with a prescribed process designed to incorporate the principles of natural justice in a more certain form than the rules developed by common law. Later changes to the Act provided rather that the rules of natural justice do in fact apply to the Panel's inquiries, to the extent that they are not incompatible with the prescribed procedures set down in the legislation and the supporting regulations.

The Corporations Legislation Amendment Bill 1993 changed the process of a Panel inquiry from a procedure largely based on an oral hearing to an inquiry largely based on submission of written evidence. The Panel has the opportunity to examine persons orally to clarify any parts of an inquiry which it considers need a hearing. Accordingly, a person to whom an inquiry relates is now given the right to make submissions to that inquiry, rather than the right to appear at a hearing before the Panel. It is intended that the change will ensure that the Panel's inquiries can be held and settled within the statutory time frame within which the legislature has asked the Panel to operate.

The amendments also sought to reinforce the peer review nature of the Panel by requiring persons to speak directly to the Panel members rather than through legal representatives. This amendment was deleted in changes to the Corporations Legislation Amendment Act.

The definition of "unacceptable circumstances" in section 732 of the Corporations Law was amended by the Corporations Legislation Amendment Act 1994 to include in the definition that unacceptable circumstances may occur because of actions of the directors of a company which caused or contributed to a takeover offer not being made to the members of the company. This is a significant addition to the definition of unacceptable circumstances and is designed to prevent directors of a target company acting in their own interests to stifle a takeover offer rather than allowing the members of the company the opportunity to decide on the merits of the proposal.

The supporting regulations have yet to be published.

## **5. Future Directions**

The work of the Panel is primarily determined by the complexity and number of matters referred to it by the ASC. There is a small amount of informational and policy development work required but this is minor compared to that required by even a single application.

The Panel considers that its experience in its single referral to date has been an important development and learning process for all concerned. It is keen to ensure that its mode of operation is not one of perceived adversarial, quasi-legal manner but an informal, practical manner with Panel members acting as persons with business and market expertise rather than as inquisitors or judges.

The Panel considers that the amendments introduced by the Minister will ensure that it is able to fulfil its role efficiently and in the timely commercial manner intended of it.

## **6. Panel Expenditure**

The Panel's funding comes via the ASC budget. The ASC allocated from its budget \$148,000 to the Panel for the year 1993-94.

The Panel's expenses for the year 1993-94 were \$110,099. This excludes salary accounts payable of \$3,076 which were remaining on hand at 30 June 1993 and were paid during the financial year 1993/94.

### Remuneration

The current(1) Remuneration Tribunal determination is :

#### Members

Annual Fee	\$1622
When Engaged on Panel Business	\$434 per day
Travelling Allowance	\$300 per day (max)

#### President

Annual Fee	\$5405
When Engaged on Panel Business	\$542 per day
Travelling Allowance	\$300 per day (max)

### Audit

The Panel's expenditures are audited by Australian National Audit Office as part of the ASC's financial statements.

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(1)The Panel's remuneration was amended by determination no. 19 of 1993 on 21/12/93.

## 7. Appendix A - Panel Members(2)

Name	Organisation	Date of Appointment
Mr David Hoare	BT Australia Ltd	3 July 1991
Mr: Ross Adler	Santos Ltd.	3 July 1991
Ms Elizabeth Alexander	Price Waterhouse	3 July 1991
The Hon. Mr Jerrold Cripps QC		4 March 1994
Mr Ian Clark		3 July 1991
Mr David Elsum AM	AAT	12 Dec 1991
Mr Ronald Evans	Spotless Group Ltd.	3 July 1991
Mr Warwick Higgs		24 Sept 1991
Mr Stuart Hornery AO	Lend Lease Corporation Ltd.	3 July 1991
Mr Peter Jooste	Parker & Parker	3 July 1991
Mr Russell Miller	Sly & Weigall	3 July 1991
The Hon Mr Justice Trevor Morling	Supreme Court N.T.	4 March 1994
Mr Peter O'Donohue	Nicholas O'Donohue & Co	25 July 1991
Mr Graham Stanford	AAT	12 Dec 1991
Mr Geoffrey Torney	Byrne Jones & Torney	24 Sept 1991
Mr Dean Wills AM	Coca-Cola Amatil Ltd.	3 July 1991

Panel Secretary and Contact Officer: -  
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(2)At 30/06/1994

## 8. Appendix B - Panel Financial Statement 1993-94

### Corporations and Securities Panel Financial Statement 1 July 1993 to 30 June 1994

<b>Budget Allocation 1993/94</b>	\$	\$
		<b>148,000</b>
Less: <b>Administrative Expenses</b>		<u>1,327</u>
<b>Salary Related Expenses</b>		
Members' Annual Fees(3)	29,907	
Staff Salaries (incl below-line cost)	72,078	
Employer Superannuation	8,727	
Workers Compensation	<u>1,136</u>	
		<b>111,848</b>
Expenditure to 30 June 1994		
		<b>113,175</b>
Add: Accounts Payable at 30/06/94	nil	
Deduct: Accounts Paid from 30/06/93	<u>-3,076</u>	<u>-3,076</u>
<b>Total Expenses Incurred to 30 June 1994</b>		<u><b>110,099</b></u>
<b>Balance of Allocation</b>		<b>37,901</b>

(3)Fees owing to members from 1992-93 totalling \$3076 were paid in 1993-94.